

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Case No. 2:17-cr-00086-HDM-NJK

Plaintiff,

V.

## ORDER

ANTHONY DELANO HYLTON, JR.,

Defendant.

9 The court has considered the report and recommendation of the  
10 United States Magistrate Judge (ECF No. 314) filed on April 22,  
11 2020, in which the magistrate judge recommends that this court  
12 deny the defendant's motion to dismiss (ECF No. 293). The defendant  
13 has filed objections (ECF No. 327), and the government has  
14 responded (ECF No. 337).

15 The court has considered the pleadings and memoranda of the  
16 parties and other relevant matters of record and has made a review  
17 and determination in accordance with the requirements of 28 U.S.C.  
18 § 636 and applicable case law, and good cause appearing, the court  
19 hereby

ADOPTS AND ACCEPTS the report and recommendation of the  
United States Magistrate Judge (ECF No. 314).

22 The court agrees, as the defendant has conceded in his reply,  
23 that Officer Hinkel's conduct does not amount to bad faith  
24 sufficient to support dismissal.

In his reply, the defendant asserts that the government suppressed the result of DNA tests of the firearm, and for the first time in his objections, he argues that this alleged suppression amounts to bad faith. In connection with this claim,

1 the defendant filed a motion to compel production of DNA test  
2 results not previously disclosed in his case.

3 In support of his motion to compel, the defendant cited to  
4 evidence showing that the firearm was swabbed for DNA and that a  
5 swab of the unexpended cartridge from the October 2016 robbery was  
6 submitted for DNA comparison if a sufficient DNA profile was  
7 established. (See ECF No. 336-4 at 3; ECF No. 336-5 at 2-5). He  
8 also relied on the testimony of a detective at trial who stated  
9 that he had submitted swabs for testing of potential DNA but had  
10 not yet received any results. (ECF No. 344 at 7-8).

11 On June 23, 2020, the magistrate judge granted the defendant's  
12 motion and compelled the government to either turn over any  
13 undisclosed test results or, if the results were unavailable,  
14 provide a written explanation of its efforts to locate the results  
15 and of all surrounding circumstances.

16 In response to the order granting the motion to compel, the  
17 government stated that there are no completed or pending tests of  
18 the swabs from the firearm or the cartridge. Although the firearm  
19 was swabbed, the government never requested that the swab be  
20 tested. And although a test was ordered of a swab of the cartridge  
21 case, the lab terminated the request the same day. The government  
22 further explains that the detective was simply mistaken in his  
23 trial testimony that any test results were pending.

24 On the basis of the government's representations, which the  
25 defendant has provided no cause to doubt, there is no basis in the  
26 record before the court to conclude that the government has failed  
27 to turn over the results of any tests conducted in this case.  
28

1 Accordingly, no finding of bad faith may rest on this ground,  
2 either.

3 As to whether the defendant has satisfied the standard for  
4 any other spoliation sanction, including but not limited to an  
5 adverse inference instruction, the court agrees with the  
6 magistrate judge that any DNA evidence on the firearm before it  
7 was handled by Officer Hinkel is both speculative as to its  
8 existence and not particularly relevant to the remaining charge in  
9 this case, which is felon in possession of a firearm -- at least  
10 not where, as here, the defendant has admitted to ownership of the  
11 firearm in question.<sup>1</sup> An adverse inference instruction is not  
12 therefore warranted.

13 Accordingly, IT IS ORDERED that the defendant's motion to  
14 dismiss or, in the alternative, for an adverse inference  
15 instruction, (ECF No. 293) is DENIED.

16 IT IS FURTHER ORDERED that the defendant's motion to reserve  
17 ruling until after resolution of his motion to compel (ECF No.  
18 345) is DENIED AS MOOT. The motion to compel has been resolved.

19 IT IS SO ORDERED.

20 DATED: This 5th day of August, 2020.

21   
22 \_\_\_\_\_  
23 UNITED STATES DISTRICT JUDGE

24  
25  
26 <sup>1</sup> While the court has not ruled that the defendant's statements to the officers  
27 at the scene of his arrest may be introduced, the defendant's statements during  
his interview on January 31, 2017, have been admitted. During that interview,  
the defendant admitted to purchasing and owning the firearm. (ECF No. 319 (Tr.  
28 68-69)).